STATE OF MICHIGAN

COURT OF APPEALS

GRINWOOD DEVELOPMENT, LLC,

Plaintiff/Counter-Defendant-Appellee,

v

BILL MESSER, d/b/a MESSER ORTHOPEDICS,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
January 28, 2010

No. 289029
Kent Circuit Court
LC No. 08-001593-CK

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from the circuit court's orders dismissing his counterclaim and entering a default judgment in favor of plaintiff. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant leased from plaintiff space in a building in order to run his business. A dispute arose between the parties concerning whether other tenants in that building could operate competing businesses. Defendant stopped paying rent, and plaintiff filed suit to recover amounts due. Defendant answered, offered affirmative defenses, and counterclaimed for breach of contract.

On May 12, 2008, the trial court issued a scheduling order, whose provisions included that lay witnesses be disclosed at least 28 days before the close of discovery, and that discovery itself would close on September 9, 2008. On June 16, 2008, plaintiff filed requests for admissions, production of documents, and interrogatories. On July 10, 2008, defendant filed a response to the request for admissions only. On August 13, 2008, defendant filed a witness list consisting exclusively of himself.

Various informal communications permeated these proceedings through which plaintiff asked for, and defendant promised, responses to the interrogatories and requests for production, but defendant continued to fail to respond.

On September 4, 2008, plaintiff filed a motion to compel discovery. On September 15, 2008, the trial court, in response to a stipulation of the parties, entered an order requiring that

defendant respond to plaintiff's interrogatories and requests for production by September 22, 2008, and extending the discovery closure date to October 10, 2008. On September 18, 2008, the trial court set a case evaluation hearing for November 13, 2008.

The September 22, 2008, deadline passed with no further discovery from defendant. Plaintiff reports that defendant later sent an incomplete and unsigned draft of his anticipated answers to the interrogatories, but no documents. The trial court examined this informal draft and found it wanting for details.

On October 3, 2008, still awaiting discovery from defendant, plaintiff filed a motion for sanctions. On October 9, 2008, the day before the close of discovery and the hearing on the motion for sanctions, defendant filed an amended witness list, listing several of plaintiff's other tenants. Following the hearing on the motion for sanctions, the trial court determined that defendant's failure to fulfill discovery obligations was willful, not accidental, and decided to enter a default judgment in plaintiff's favor and dismiss the counterclaim.

We review a lower court's decision to grant a default judgment in response to discovery violations for an abuse of discretion. *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 397; 484 NW2d 718 (1992). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

MCR 2.313(D)(1)(b) authorizes a trial court to sanction a party who fails to serve answers to interrogatories in accord with subrule (B)(2)(a), (b), or (c), which sets forth the following sanctions:

> (a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;
>
> (c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party[.]

On appeal, defendant offers little in the way of explanation for any of his delays or other failures to comply conscientiously with discovery obligations. Nor does defendant address plaintiff's persuasive arguments concerning discovery provided so late in the proceedings as to impair plaintiff's ability to depose witnesses or prepare for case evaluation.

Defendant suggests that he perfectly answered the interrogatories but for the one concerning how much he had paid plaintiff, and also that this one deficiency was of no consequence because plaintiff, as the recipient of those payments, should have had that information at hand. Concerning the former assertion, the lower court's register of actions lists no response to interrogatories. Again, defendant belatedly sent a mere rough, unsigned, draft of

anticipated answers, which the trial court found to be deficient in detail. Having failed properly to serve answers to the interrogatories, defendant failed to provide plaintiff with information plaintiff could rely upon for purposes of preparing its case. Concerning defendant's latter assertion, defendant cites no authority for the proposition that a party may ignore a discovery request only because the requesting party is thought to have other means of obtaining the information. Further, the possibility that the parties might disagree concerning how much rent defendant had paid, and thus how much in arrears he was, seems an obvious concern.

Defendant argues that the trial court, in stating that "[w]illful does not require wrongful intent," but that it was sufficient "[i]f the failure is conscious or intentional as opposed to accidental," understated what constitutes a willful discovery violation. We disagree, and conclude the trial court in fact properly recognized that "willful" did not require such wrongful intent as the actual intent to prejudice the opposition, but included a knowing and reckless failure to comply with obligations. See *Frankenmuth*, 193 Mich App at 397 ("The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary.").

Defendant relies on *Frankenmuth*, 193 Mich App at 398-399, where this Court held that a trial court abused its discretion in resorting to the sanction of a default judgment in connection with a party who failed to answer interrogatories. However, at issue in that case was an alleged failure to supplement answers, *id.* at 397-398, and this Court concluded that willfulness was not apparent "in the absence of an order or some other compelling circumstance . . . ." *Id.* at 399. In this case, there was a court order in place, and answers to interrogatories were never properly served or filed.

However, "[t]he court must . . . evaluate on the record other available options before concluding that a drastic sanction is warranted." *Id.* at 397. In this case, the trial court provided no such analysis. However, we agree with plaintiff that lesser sanctions would have produced the same result, rendering any error in this regard harmless.

Sanctions falling short of outright dismissal and default,[1] such as presuming that all interrogatories are answered favorably to plaintiff, disallowing evidence of financial damages in connection with the counterclaim, and striking all of defendant's witnesses but for himself, would so seriously impair defendant's position that he could hardly prevail as defendant or counterplaintiff. And defendant did participate on the hearing concerning damages, which were thus determined upon litigation on the merits instead of by default.

For these reasons, defendant fails to show that the trial court abused its discretion in dismissing his counterclaim and proceeding to default judgment on plaintiff's cause of action.

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[1] Defendant argued below that nothing harsher than an award of attorney fees was proper. The trial court obviously, if tacitly, disagreed that such a mild sanction was appropriate in this situation, and it would do nothing to remedy the prejudice plaintiff faced by receiving defendant's information so late, if at all.

Affirmed.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray